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Legal Fictions: Copyright, Fan Fiction, and a New Common Law

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LEGAL FICTIONS: COPYRIGHT, FAN FICTION, AND A NEW COMMON LAW

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I. INTRODUCTION

A girl owns a number of Barbie dolls. She makes outfits for them and constructs elaborate scenarios in which they play starring roles. She enacts her dramas in her front yard, where passers-by can easily see. Does she violate the law? What if the girl writes down her stories starring Barbie? What happens when she lets her friends read them? What if she e-mails those stories to a Barbie mailing list? What if she posts those stories and a picture of Barbie in her new outfit on her Web page?[1]

Copyright law has long been a concern more for corporations than for ordinary citizens. However, with new technologies that allow individuals to produce and distribute information easily, however, copyright law is becoming increasingly relevant to common activities. Much has been written about the problems created by the easy reproduction of copyrighted documents and by the poor fit between law and technology that makes every person who browses the World Wide Web ("the Web") a likely lawbreaker.[2] This Article goes beyond the debate over pure copying to

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1. *See, e.g.*, *Barbie* (visited Oct. 22, 1996) <http://think.ucdavis.edu/winter_96/barbie.html> (containing Barbie image with words superimposed); Tracy Wascom, *Hacker Barbie* (visited Oct. 22, 1996) <http://www.awwwsome.com/joy/archives/31MAR96/hacker_barbie.html> (Barbie story); *see also* HERBERT KOHL, SHOULD WE BURN BABAR? 14 (1995) (describing potentially shocking Barbie games played by children). Note that all Internet sources are on file with the author or the *Loyola of Los Angeles Entertainment Law Journal*.

2. The legal problem is that viewing a document on the World Wide Web requires making a copy of that document on the client computer. Even if the copy is not saved to long-term memory, it is permanent enough to constitute a copyright violation. *See* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 519 (9th Cir. 1993); Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 840 (Fed. Cir. 1992); INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 64 (1995); THOMAS J. SNEDINGHOFF, ONLINE LAW 148 (1996).

At the same time, browsing the Web is practically more like visiting a bookstore than like copying books. Many authors have addressed the problems this new technology creates for the

analyze the implications of creative work—now widely accessible via the Internet—that draw on copyrighted elements of popular culture.

The impulse to ask "What happened next?" is probably as old as the first well-told story. Storytellers have long drawn on a vast reservoir of cultural knowledge. No one had a better claim to characters and situations in that reservoir than any other person.[3] For example, moved by characters he did not create, Alfred, Lord Tennyson imagined and described the further adventures of Ulysses.[4] Because of social and economic changes during the past few hundred years, however, most readily available and widely known characters are now corporate creatures.[5]

Widespread practices of secondary creativity include making up stories about Barbie and Ken and telling one's own *Star Trek* stories because one episode a week is not enough.[6] As legends and folktales of Coyote the Trickster or Paul Bunyan previously brought audiences together, modern secondary creativity allows fans to transcend passive reception, using material to which they have easy access. Should these acts

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reproduction right protected by copyright law. *See* Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215 (1996); Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466 (1995); I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993 (1994); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19 (1996); Raymond T. Nimmer & Patricia Ann Krauthaus, *Copyright on the Information Superhighway: Requiem for a Middleweight*, 6 STAN. L. & POL'Y REV. 25 (1994); Jenevra Georgini, Note, *Through Seamless Webs and Forking Paths: Safeguarding Authors' Rights in Hypertext*, 60 BROOK. L. REV. 1175 (1994).

3. *See generally* HAROLD OGDEN WHITE, PLAGIARISM AND IMITATION DURING THE ENGLISH RENAISSANCE (1935) (discussing stunning creativity of Elizabethan era in England enabled by widespread borrowing of plot, character, and setting).

4. *See* ALFRED TENNYSON, *Ulysses*, *in* IN MEMORIAM, MAUD AND OTHER POEMS 44 (John D. Jump ed., 1974). Tennyson was himself drawing on the rewritten *Ulysses* of Dante's *Inferno*.

5. *See* RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY (1996); HERBERT I. SCHILLER, CULTURE, INC.: THE CORPORATE TAKEOVER OF PUBLIC EXPRESSION (1989); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991).

6. *See* HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE 75 (1992) (quoting fan as saying "I've even been forced to write my own stories just to get me through until the next episode is out"); *see also* DOROTHY ALLISON, *Puritans, Perverts, and Feminists*, *in* SKIN: TALKING ABOUT SEX, CLASS AND LITERATURE 93 (1994) (describing author's use of favorite characters and settings to tell her own stories). *Star Trek* is the largest and most widely known source of media "fandom," but by no means the only source. *See* JENKINS, *supra*, at 158; K.S. Nicholas, *Fan Fiction on the Net* (visited Oct. 22, 1996) <http://members.aol.com:80/ksnicholas/fanfic/index.html> (linking to fan fiction from over 160 different television shows and many movies, comic books, and role-playing games).

of self-expression be illegal, or is secondary creativity the kind of human endeavor that the law should respect?

The question is not an idle one. Many entertainment corporations have left fan fiction alone, but a few have attempted and are attempting to stamp out unauthorized use of their proprietary characters.[7] With the increasing use of the Internet by amateur writers, fan fiction is becoming easier to find and police.[8] Most fan authors are non-lawyers of limited means, and are at the mercy of their Internet service providers, who, fearing liability as accessories to copyright infringement, will shut down an account or Web site in response to an informal complaint from a copyright owner.[9] Therefore, copyright owners will find it simple to enforce a vision of copyright law that extends to every mention of their property.

As Michael Madow has written in the context of the common-law right of publicity for celebrities:

> It is impossible . . . for the law to remain neutral in this contest. The law can strengthen the already potent grip of the culture industries over the production and circulation of meaning, or it can facilitate popular participation, including participation by

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7. *See* JENKINS, *supra* note 6, at 30–31 (describing Lucasfilm's early attempts to suppress *Star Wars* fan fiction, especially erotic stories); Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. MIAMI ENT. & SPORTS L. REV. 429 (1994) (discussing Disney Company's campaigns against unauthorized paintings and parodies); *TSR's Letters to an FTP Site* (last modified Jan. 3, 1996) <http://web.cs.ualberta.ca/~wade/HyperDnd/TSR/tsr2.html> (containing letter from Rob Repp, TSR manager, asserting that all creative fan activity posted on the Internet relating to *Advanced Dungeons & Dragons*, including stories, infringes on TSR copyrights); Letter from Lori L. Bloomer to fictalk@chaos.taylored.com (Oct. 28, 1996) (on file with the *Loyola of Los Angeles Entertainment Law Journal*) (discussing Paramount's initial attempts to suppress *Star Trek* fan fiction and current support for fan community); Letter from Joanne Godwin to Rebecca Tushnet (Nov. 1, 1996) (on file with author) (discussing cease and desist letters served on fan authors and "zine" publisher by lawyers for *Highlander: The Series*); Letter from Leigh M. to slashpoint@ucdavis.edu (Oct. 27, 1996) (on file with author) (discussing cease and desist letter served on seller of *Quantum Leap* homoerotic fan fiction; stating that *Quantum Leap* producers are not currently pursuing campaign against fan fiction).

As Jane Gaines points out, "[T]he owners of popular forms, which constitute our most widely shared culture . . . are in the contradictory position of encouraging the widespread uses of BATMAN, SUPERMAN, and SNOW WHITE. But when those forms are used spontaneously . . . the owners want to take them back." JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW 228 (1991).

8. *Cf.* Elkin-Koren, *supra* note 2, at 285–86 (arguing that technological changes give copyright owners greater incentive and ability to act against individuals).

9. *See* Mark Eckenwiler, *Copyright on the Web Enhanced*, LEGAL TIMES, Aug. 19, 1996, at S29, S44 (describing Church of Scientology's settlement with an Internet service provider); Amy Harmon, *Web Wars: Companies Get Tough on Rogues*, L.A. TIMES, Nov. 12, 1996, at A1 (describing the University of Texas' denial of all Internet access to students after a corporation's complaint about one Web page).

> subordinate and marginalized groups, in the processes by which meaning is made and communicated.[10]

This Article argues that the secondary creativity expressed in noncommercial fan fiction deserves the protection of the law. Section 107 of the Copyright Act allows "fair use" of copyrighted material.[11] Fan fiction should fall under the fair use exception to copyright restrictions because fan fiction involves the productive addition of creative labor to a copyright holder's characters, it is noncommercial, and it does not act as an economic substitute for the original copyrighted work.[12]

Part II of this Article examines fan fiction and the functions it serves for its authors and audiences. Part III sets forth the formal categories used in copyright law to determine the difference between copyright infringement and fair use. Part IV applies the fair use factors and examines the "copyright disclaimers" included as a matter of custom in fan fiction, arguing that such disclaimers address the valid concerns of copyright law and implicitly make a commonsense case that fan fiction is fair use.

Fan fiction deserves protection because it gives authors and readers meaning and enjoyment, allowing them to participate in the production of culture without hurting the legitimate interests of the copyright holder. Fan copyright disclaimers express a sense of justice and fairness that copyright law must address, especially as it attempts to extend its reach to individuals. Pragmatic considerations suggest that copyright law should not stray too far from commonsense understandings. If people consider a law to be silly and violate it routinely by performing activities that they feel are both harmless and central to their lives—telling others the stories they tell themselves—the law will not be respected. Copyright law might be more frequently followed if the lines it drew resembled emerging implicit copyright norms.[13]

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10. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 141–42 (1993); *see also* L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 7–11 (1991) (arguing that industry promotes misconceptions of copyright law and warning that "if such fallacies go unchallenged long enough, they are likely to become a substitute for the truth").

11. *See* 17 U.S.C. § 107 (1994).

12. Trademark protection for characters or catch phrases is a separate issue. A recent federal law against trademark dilution exempts noncommercial uses from its scope. *See* Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 1996 U.S.C.C.A.N. (109 Stat. 985) 1029. State law dilution issues remain although disclaimers may protect fan authors from charges of passing off or other trademark infringement. *See infra* Part IV.

13. *See* Litman, *supra* note 2, at 43 (arguing for reliance on public norms in the context of copy reproduction right).

II. THE HISTORY AND VALUE OF FAN FICTION

"Fan fiction," broadly speaking, is any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as "professional" writing. Fan authors borrow characters and settings, such as Princess Leia and Luke Skywalker or the *Starship Enterprise*, for use in their own writings. Fan fiction spans genres including comedy, drama, melodrama, adventure, and mystery.

Fan fiction and organized media fandom have been traced to the second season of *Star Trek* in 1967.[14] Some viewers loved the television show so much that they imagined further adventures for Kirk, Spock, McCoy, and additional characters in the same Federation "universe."[15] The extent of fandom and fan fiction is uncertain. Several clearinghouse publications track printed fan fiction, and one such publication lists over 250 existing publications and more than 100 planned ones.[16] The recent rise of electronic fandom has broadened the readership for fan fiction, though it is impossible to determine how broad it is.[17]

Media fandom is thus sizable and varied, but also marginal and devalued. Fans are widely seen as eccentric at best, delusional at worst. Henry Jenkins notes, "What may make [fan activity] particularly damning is that fans cannot as a group be dismissed as intellectually inferior; they often are highly educated, articulate people who came from the middle classes .... What cannot be dismissed as ignorance must be read as aesthetic perversion."[18] But fandom is not an unprecedented artifact of modern mass media. It resembles and descends from earlier forms of popular culture:

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14. *See* Henry Jenkins, *'At Other Times, Like Females': Gender and* Star Trek *Fan Fiction*, *in* SCIENCE FICTION AUDIENCES: WATCHING *DR. WHO* AND *STAR TREK* 196 (John Tulloch & Henry Jenkins eds., 1995) [hereinafter SCIENCE FICTION AUDIENCES]. Literary science fiction had a related tradition of self-published fiction dating from the 1920s. *Id.*

15. Jenkins lists 10 kinds of fan fiction, ranging from "missing scenes" written to fill in gaps in the official texts to "alternate universes" where only a few elements are taken from the shows. Erotic stories are not uncommon. JENKINS, *supra* note 6, at 162–77. Parody and humor are also common. Though Jenkins is discussing *Star Trek* fan fiction in particular, his categories apply across fan fiction. *See, e.g.*, Gil Trevizo, *Posting Guidelines for the X-Files-Fanfic Mailing List* (visited Oct. 14, 1996) <http://mail.utep.edu/~trevizo/x-files/post.html> (delineating suggested codes to identify story types quickly for readers).

16. *See* JENKINS, *supra* note 6, at 156.

17. Even before the rise of electronic fandom, the self-publishing and widespread lending characteristic of fandom prevented any accurate estimate of readership. *See id.* at 157. Many fan fiction Web sites have counters, some of which have recorded tens of thousands of "hits" or visits by browsers. *See, e.g.*, *Gossamer Archive* (visited Apr. 8, 1997) <http://light.iinet.net.au/gossamer> (*X-Files* site, accessed 75,309 times between Feb., 12, 1996 and April 8, 1997).

18. JENKINS, *supra* note 6, at 18–19.

> Fan culture, like traditional folk culture, constructs a group identity, articulates the community's ideals, and defines its relationship to the outside world. Fan culture, like traditional folk culture, is transmitted informally and does not define a sharp boundary between artists and audiences. Fan culture, like folk culture, exists independently of formal social, cultural, and political institutions; its own institutions are extralegal and informal with participation voluntary and spontaneous. Fan texts, like many folk texts, often do not achieve a standard version but exist only in process, always open to revision and reappropriation . . . .[19]

Media creations on which fandom is based serve the same function for fan authors as Paul Bunyan, Coyote, and Ulysses did in earlier times in that they provide a common language. They are, as myths and folktales once were, the raw materials out of which people build their own original works. These works then link the stories and their authors to an existing and receptive community by virtue of their shared raw materials.[20]

Describing his confrontation with a lawyer for Fox Broadcasting, one fan explained:

> [The lawyer] asked why fan fiction writers don't just come up with something original. I explained to him that . . . an original work would not have the kind of community fan fiction automatically creates between reader and writer. I went on to talk about how many of the works of Chaucer and Shakespeare were fan fiction . . . and that the entirety of Western literature emerged from an oral tradition that is at its basis fan fiction.[21]

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19. *Id.* at 272–73; *see also* Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 378 (1992).

20. *Cf.* JENKINS, *supra* note 6, at 268–70 (making similar argument about fan music, which builds on copyrighted songs as folk music used to build on similarly well-circulated songs).

21. Letter from Gil Trevizo to fictalk@chaos.taylored.com (Oct. 31, 1996) (on file with author); *see also* Interview by Taylor Harrison with Henry Jenkins, *in* ENTERPRISE ZONES: CRITICAL POSITIONS ON STAR TREK 259, 276 (Taylor Harrison et al. eds., 1996) [hereinafter Jenkins Interview] (linking fan fiction to historical secondary creativity); Negativland, *Fair Use* (visited Oct. 28, 1996) <http://www.eff.org/pub/Intellectual_property/fair_use.article> (discussing folk music). Or, as Rudyard Kipling wrote at the dawn of the age of copyright:

> When 'Omer smote 'is bloomin' lyre,
> He'd 'eard men sing by land an' sea;
> An' what he thought 'e might require,
> 'E went an' took—the same as me!

Rudyard Kipling, *When 'Omer Smote 'Is Bloomin' Lyre*, *in* RUDYARD KIPLING'S VERSE: DEFINITIVE EDITION 349 (1940).

The ethos of fandom is one of community, of shared journeys to understanding and enjoyment.[22] Regardless of literary value, fan fiction is a pleasurable and valuable part of many fans' experiences. The political importance of fandom stems from *sharing* secondary creations. Fans feel that they are making significant life choices when they share their work with a broader community of like-minded people.[23]

Fans refuse to be passive consumers of the cultural productions that have deeply affected them. "Unimpressed by institutional authority and expertise, the fans assert their own right to form interpretations, to offer evaluations, and to construct cultural canons."[24] Readers and raiders insist that authors cannot control the interpretations of their texts. One wrote, "I still don't agree with the concept that property rights over fiction ... include any rights of the author/producer to determine *how* readers or viewers understand the offering. In this sense, I don't believe fans can take from the producers anything which the producer owns."[25] Fans also see themselves as guardians of the texts they love, purer than the owners in some ways because they seek no profit.[26] They believe that their emotional

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22. Mass culture imagery is evoked . . . because such imagery is immediately accessible to their desired audience and allows the fan to move from a sphere of local face-to-face contacts into a culture that is national and even international in scope. Using these images facilitates communication within an increasingly alienated and atomized culture.

JENKINS, *supra* note 6, at 273. *See generally* CAMILLE BACON-SMITH, ENTERPRISING WOMEN: TELEVISION, FOLKLORE, AND COMMUNITY (1992) (describing supportive groups of women who create and interpret *Star Trek* texts together).

23. *See* Jenkins, *supra* note 14, at 203. Fandom is extraordinarily open to marginalized groups, including women, people of color, gays and lesbians, pink-collar workers, and people who are members of several of these groups. Henry Jenkins, *'Strangers No More, We Sing': Filking and the Social Construction of the Science Fiction Fan Community*, *in* THE ADORING AUDIENCE: FAN CULTURE AND POPULAR MEDIA 208, 213 (Lisa A. Lewis ed., 1992) [hereinafter THE ADORING AUDIENCE]. Most scholarship on media fandom discusses its gender politics and women's predominance as writers and readers. *See, e.g.*, BACON-SMITH, *supra* note 22; Constance Penley, *Feminism, Psychoanalysis, and the Study of Popular Culture*, *in* CULTURAL STUDIES 479 (Lawrence Grossberg et al. eds., 1992).

24. JENKINS, *supra* note 6, at 18.

25. *Id.* at 32 (quoting Barbara Tennison); *see also* GAINES, *supra* note 7, at 232 ("Once gone from the text [the author] can never return to it . . . . [O]nce it has left the orbit of the owner, it can be reinterpreted and reinserted into the everyday lives of its users."); Jenkins Interview, *supra* note 21, at 267 (reporting fan viewpoint that "[t]he text already belongs to us; we are not taking anything other than our own fantasies, so therefore we are not stealing anything at all"); Cynthia Johnson, *Coffee* (visited Nov. 8, 1996) <http://nycmetro.com/Bobbi/coffee.htm> ("*The X-Files* is the creation and exclusive property of Chris Carter et al. Yeah, right. The way a pearl is the exclusive property of an oyster!").

26. "[W]e have made [*Star Trek*] uniquely our own, so we do have all the right in the world . . . to try to change it for the better when the gang at Paramount starts worshipping the almighty dollar, as they are wont to do." Henry Jenkins, *Star Trek Rerun, Reread, Rewritten: Fan Writing as Textual Poaching*, 5 CRITICAL STUD. IN MASS COMM. 85, 100 (1988) (quoting fan).

and financial investment in the characters gives them moral rights to create with these characters.[27]

In a postmodern era in which almost all possible themes seem to have been already produced, reworking may be the only creative act still available. Unlike "high" art, fan fiction draws on popular culture in ways that are easy for large communities to understand and enjoy.[28] Modern technology allows fans to reach other similar minds at minimal cost.[29]

Fan fiction, taking familiar characters into new and often startling situations, starkly demonstrates that authors cannot control the interpretation of their works once others encounter them.[30] Fans' sense of partial ownership, shared between themselves and the original creators, comports with intellectual property law. Copyright itself means that buying a book allows a person to read it, burn it, give it away, but not copy it for a profit. Ownership of information is always partial.[31]

Contemporary storytellers use modern technology to reach their audiences, and copyright, therefore, plays a role in what they can say. Lastly, this Article examines the standards that copyright law uses to determine whether a use of another's copyrighted creation is legitimate.

III. FORMAL COPYRIGHT LAW

A. Upon What, If Anything, Does Fan Fiction Infringe?

Fan fiction does not involve pure copying. It might infringe on a creator's copyright in characters—the unique personalities created to express a concept. Historically, copyright law protected only against exact

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27. *See* Coombe, *supra* note 19, at 387–88; John Fiske, *The Cultural Economy of Fandom*, *in* THE ADORING AUDIENCE, *supra* note 23, at 10.

28. *See* JENKINS, *supra* note 6, at 45 (describing how reading and interpretation occur as communal activities among fans, so that fans shape each other's reactions).

29. *See* Elkin-Koren, *supra* note 2, at 254–55.

30. "The nature of fan creation challenges the media industry's claims to hold copyrights on popular narratives. Once television characters enter into a broader circulation, intrude into our living rooms, pervade the fabric of our society, they belong to their audience and not simply to the artists who originated them." JENKINS, *supra* note 6, at 279.

Fan fiction, which existed in print for years before the Internet allowed it more widespread popularity, is also evidence that some of the extreme claims about technology's effect on information-users' power are overstated. Meaning was never fixed in some Golden Age of authorial control. *See, e.g.*, Elkin-Koren, *supra* note 2, at 241–42 (claiming that new technology allows unique interactivity and responsiveness to texts). Readers have always rewritten the texts they enjoy. It has simply been difficult for readers to discover each others' interpretations.

31. *See* JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 18 (1996).

copying, excluding even protection against translation and abridgment.[32] Copyright law later expanded its reach beyond duplication to looser forms of borrowing, including use of well-established characters. The extent of protection for characters independent of the works in which they appear is unclear, and the case law is confusing.[33] Most authorities nonetheless agree that a character can be protected by copyright.[34] The difficult questions of "substantial similarity" in the law of character copyright—is Wonderman too much like Superman and thus an infringement of him?[35]—do not present much of a problem for fan fiction, as fan authors do not claim to have created an independent character.

In the "Sam Spade" case, the Ninth Circuit was asked to decide whether radio sequels starring Dashiell Hammett's hard-boiled fictional detective infringed on Warner Brothers' copyright to Hammett's *The Maltese Falcon*.[36] The court concluded that unless a character "constitutes the story being told," the character is not within the scope of copyright protection.[37] The court reasoned that a regime in which an author surrendered all rights to characters the first time they were used in a story sold to another would not fulfill copyright's aim of "promot[ing] the useful arts."[38] "The characters were vehicles for the story told, and the vehicles did not go with the sale of the story."[39]

The Ninth Circuit appeared to limit the "Sam Spade" test substantially several decades later in *Walt Disney Productions v. Air Pirates*.[40] In *Air*

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32. *See* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 3–4 (1994).

33. *See* David B. Feldman, Comment, *Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection*, 78 CAL. L. REV. 687 (1990) (proposing addition of explicit protection for characters to existing law in order to avoid confusion).

34. *See* Detective Comics, Inc. v. Bruns Publications, Inc., 111 F.2d 432 (2d Cir. 1940); Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., 900 F. Supp. 1287 (C.D. Cal. 1995); *see also* Litman, *supra* note 7, at 430; Michael Todd Helfand, Note, *When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 STAN. L. REV. 623 (1991). *But see* Francis M. Nevins, Jr., *Copyright + Character = Catastrophe*, 39 J. COPYRIGHT SOC'Y 303 (1992) (arguing against such protection).

35. *See Detective Comics*, 111 F.2d at 433 (answering this question in the affirmative).

36. Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945 (9th Cir. 1954).

37. *Id.* at 950.

38. *Id.*

39. *Id.* No doubt, the traditional practice of writing sequels to popular works influenced the court's sympathy for Hammett (though in reality CBS benefited). The strong tradition of storytellers' use of established characters, which predates the practice of single-author sequels, should argue equally for the application of a generous test for fan authors. Other storytellers could create new characters similar to the old; but then, so could Hammett.

40. 581 F.2d 751 (9th Cir. 1978).

Pirates, an "alternative" publication printed cartoons that showed Disney characters engaging in potentially shocking behavior. The court held that the use of Disney's distinctive visual images constituted copyright infringement. The application of this standard to fan fiction is uncertain: the characters *used* are available in both literary and audiovisual form, but they are only *described* in word-portraits.[41]

Where the main work is audiovisual and the use in question is not, the right to produce derivative works could also be involved.[42] The House Report on the Copyright Act of 1976 explained:

> To be an infringement the "derivative work" must be "based upon the copyrighted work," and the definition in section 101 refers to "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." Thus, to constitute a violation of section 106(2), the infringing work must incorporate a portion of the copyrighted work in some form; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause.[43]

One court has held that a script treatment for a sequel to a movie was a derivative work when the treatment made extensive use of the original work's characters and settings.[44] However, this interpretation is strained. The House's language appears to distinguish between transposing an original to a different medium and adding a substantial amount that is new and different.[45] At a minimum, fan fiction falls into a middle ground between a film of a book and a "musical composition inspired by a novel." Part IV argues that it resembles the latter more than the former.

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41. *Cf.* Nevins, *supra* note 34 (arguing that word-portraits are inherently more subjective than visual images and that, therefore, courts should be unwilling to find infringement in cases where characters are simply described in words).

42. *See* 17 U.S.C. § 106(2) (1994) (granting copyright owner exclusive right to prepare derivative works). Feldman asserts that "the second expression of a character in the same medium as the original expression is a derivative work of that character's original expression." Feldman, *supra* note 33, at 704. However, he provides no support for this, and the definition of derivative works in the statute does not clearly compel this conclusion.

43. H.R. REP. NO. 94-1476, at 62 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675.

44. *See* Anderson v. Stallone, 11 U.S.P.Q.2d (BNA) 1161, 1167 (C.D. Cal. 1989); *see also First Inklings of Legal Research* (last modified Jan. 3, 1996) <http://web.cs.ualberta.ca/~wade/HyperDnd/TSR/ink.html> (containing letters from fans arguing over whether fan works created using *Advanced Dungeons & Dragons* rules are derivative works).

45. *See* MARGRETH BARRETT, INTELLECTUAL PROPERTY: CASES & MATERIALS 493 (1995); 1 PAUL GOLDSTEIN, COPYRIGHT § 1.4.2, at 1:12–:13.

B. Fair Use and Its Current Applications

Copyright protection has never been absolute. If it were, it would defeat its constitutional goal of promoting the public good.[46] As Judge Kozinski has written:

> Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.[47]

The Supreme Court has even recognized that "[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."[48] Congress has therefore codified a "fair use" exception to copyright protection in 17 U.S.C. § 107.

The Copyright Act of 1976 states:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[49]

Under the first factor, noncommercial use weighs in favor of a finding of fair use. Most notably, in *Sony Corp. v. Universal City Studios, Inc.*,[50] the Supreme Court held that home videotaping for personal use was fair use. The first factor has also been held to include the issue of whether the

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46. *See* U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

47. White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing *en banc*).

48. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); *see also* Sony Corp. v. Universal City Studios, 464 U.S. 417, 429, 432 (1984) (holding that the primary goal of copyright law is not a private benefit, but a means to achieve public benefit); United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) ("The copyright law . . . makes reward to the owner a secondary consideration.").

49. 17 U.S.C. § 107 (1994).

50. 464 U.S. 417 (1984).

use is merely copying or is instead "productive" or "transformative." In *Campbell v. Acuff-Rose Music, Inc.*,[51] which concerned a parody of Roy Orbison's song "Oh, Pretty Woman" by the rap group 2 Live Crew, the Supreme Court held that transformative use is favored by the law, even if the transformed text is commercial:

> The central purpose of this investigation is to see . . . whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . . . [T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . . .[52]

Campbell thus stands as a strong statement that the purpose of copyright is not to secure maximum profit to the copyright holder, but to encourage creativity by balancing the material incentives copyright provides against the necessary access to the materials from which art is made.

The second factor, the nature of the copyrighted work, is generally interpreted to extend more protection to works of fiction than to works of fact.[53] This factor is rarely significant, though it is regularly cited.[54] The Supreme Court has held that when a parody is at issue, this factor is not helpful because parodies almost always copy fictional works.[55] The second factor is also used to distinguish between published and unpublished works.[56]

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51. 510 U.S. 569 (1994).

52. *Id.* at 579 (citations omitted) (first alteration in original). The courts have at times been unclear as to whether "productive" use requires "social benefit" or "new work." Laura Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677, 708–12 (1995). *Campbell* seems to favor the "new work" test. For a relevant productive use that is widely commercially distributed, hear SPIN DOCTORS, *Jimmy Olsen's Blues*, *on* POCKET FULL OF KRYPTONITE (Epic 1991) (using characters and settings from DC Comics' *Superman* universe).

53. *See, e.g.*, *Campbell*, 510 U.S at 586 (citing cases making fact/fiction distinction); Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., 900 F. Supp. 1287, 1300 (C.D. Cal. 1995).

54. For example, in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), home copying was concededly almost completely for the purpose of viewing entertainment, not news, and yet it was held to be fair use, while in *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1985), quotation of purely factual material was held to be an infringement.

55. *See Campbell*, 510 U.S. at 586.

56. *See Harper & Row*, 471 U.S. at 551.

The third factor, the amount and substantiality of the use, was critical to one of the most significant cases upholding copyright in character. *Walt Disney Productions v. Air Pirates*[57] found copyright infringement in a satire using Disney characters. The court's rejection of the fair use defense is difficult to understand. The holding appears to rest on the conclusion that the defendants borrowed too many physical and conceptual attributes of the Disney characters.[58] Later cases have weakened *Air Pirates*' emphasis on the third factor; under current law, the transformative nature of the use would almost certainly protect the comic.[59]

The fourth fair use factor disfavors uses that are economic substitutes for the original work.[60] Commercial use creates a presumption of market effect, while noncommercial use shifts the burden to the plaintiff to show a meaningful likelihood of future harm.[61] Market substitution is distinct from other economic effects, such as a brutal parody or review that convinces audiences to stay away from a copyrighted work. Such uses reduce demand rather than competing to fill it. With respect to transformative uses, *Campbell v. Acuff-Rose Music, Inc.* substantially diminished the relevance of this factor. *Campbell* held that where transformative use is present, it must be weighed more heavily, supplanting the prior primacy of market effect.[62]

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57. 581 F.2d 751 (9th Cir. 1978).

58. *Id.* at 757–58. The court appears to be saying that Disney characters (e.g., Mickey Mouse, Donald Duck, etc.) are so well-known that less accurate portrayals would have been sufficient to evoke the characters for purposes of satire. At the same time, the court stated that "arguably defendants' copying could have been justified as necessary more easily if they had paralleled closely (with a few significant twists) Disney characters and their actions in a manner that conjured up the *particular* elements of the innocence of the characters that were to be satirized." *Id.* at 758 (emphasis added). Thus, the court wanted the defendants to be both broader and narrower in their scope. How this would be accomplished is unclear. Also, it is either pointless (if everyone who sees the comic understands that Dopey Duck is Daffy Duck despite his purple feathers, then the character has been borrowed just as surely as if it were not using an alias) or it weakens the satire (to the extent that the variations prevent readers from making the intended comparisons). "Track[ing] Disney's work as a whole as closely as possible" helps to give the satire its punch. *Id.*

59. *See Campbell*, 510 U.S. at 588 ("Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart.").

60. For an argument that the fourth factor accounts for most outcomes found in case law, see Michael G. Anderson et al., *Market Substitution and Copyrights: Predicting Fair Use Case Law*, 10 U. MIAMI ENT. & SPORTS L. REV. 33 (1993).

61. *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984). The presumption against fair use when the use is commercial was subsequently limited to exact copying. *See Campbell*, 510 U.S. at 584–85, 591 (1994).

62. *See Campbell*, 510 U.S. at 579–85. For earlier cases focusing on market effect, see *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and *Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. 1989).

IV. FAN FICTION AS FAIR USE

Case law does not address fair use in the context of fan fiction or anything reasonably similar to it. No doubt this follows naturally from the blind eye the majority of copyright owners have turned to fan fiction and from most fan authors' inability to contest the demands a minority of copyright owners have made. Copyright law in general has very little to say to noncommercial and noninstitutional actors because until very recently their activities have gone unnoticed.[63]

Much fan fiction includes a short disclaimer at the beginning that credits the copyright owners and disavows any intent to infringe. The disclaimers, though not written by copyright lawyers, focus on the most relevant fair use factors and make a persuasive case for fan fiction as fair use. This Part applies fair use principles, along with these disclaimers, to argue for creative license for fan fiction.

A. Evoking Fair Use Factors

1. The Purpose and Character of the Use

Fan fiction is mostly nonprofit, and on the Web no one has to pay to read it. Copyright disclaimers, therefore, often emphasize their noncommerciality as a reason to protect fan fiction: "[D]on't send me money, and for heaven's sake don't make any money yourself. [This is intended for] [h]ome private viewing . . . ."[64] "No money is being made from the production, display, or maintenance of these pages. They are meant for the enjoyment of *Crow* fans, and the encouragement of all aspiring writers."[65] "No permission has been given and since no money is being made here, no infringement is intended. We do this because we just plain love the characters."[66] Thus, fan authors evoke a general social consensus that noncommercial use is fair use.[67]

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63. *See* Litman, *supra* note 2, at 22–23.

64. Patrick Weekes, *Timelines* (visited Oct. 22, 1996) <http://www.rutgers.edu/~mcgrew/Brisco-County-Jr/FanFiction/Timelines.html>.

65. *The Crow Fan Fiction Archive* (visited Oct. 22, 1996) <http://www.dragonfire.net/~teneaos/crowffa.html> (archiving fiction based on comic book and movies about "The Crow," a dark hero returned from death to avenge wrongs).

66. *Star Wars Fan Fiction—Disclaimer and Copyright* (visited Oct. 22, 1996) <http://www2.psyber.com/~debra/disclaim.htm>; *see also* Macedon, *Talking Stick* (visited Nov. 4, 1996) <http://www.pitt.edu/~djtst18/fan-fic/stories/talking.txt> ("Star Trek is the property of Paramount Studios, the following a non-profit work of fan fiction. Distribution is free, but tampering with the story or removal of this disclaimer is actionable by law."); Rick von Kolen,

The other aspect of "purpose and character" is transformative use. Fan fiction involves original input, taking the borrowed characters into new situations and exploring their thoughts and feelings in ways not present in the official texts. This type of elaboration, involving the addition of much time and effort, should fall into the category of "transformative use." Fan fiction's frequent statements that a story belongs to an author, even if the characters do not, emphasize this contribution.

Fan fiction is varied and productive because fans use it to communicate with one another. Initially, *Campbell v. Acuff-Rose Music, Inc.*[68] might be read to say that such communication is *not* transformative use:

> If . . . the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer *merely uses to get attention* or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly . . . and other factors, like the extent of its commerciality, loom larger.[69]

If signaling a common commitment to a text is merely an attention-getting device, fan fiction does not meet the Court's test for productivity. But fan fiction uses its borrowing not only to hail its audience but also to participate actively in the world that an audience shares. Fan fiction does something new with what it uses, and *Campbell* may be more convincingly read as implying that fan fiction is transformative and thus fair use (and implicitly that fair use protects "new art," not merely work that courts deem socially beneficial). The Court continued, "[c]ontext is everything, and the question of fairness asks what else the parodist did besides go to the heart

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For the Love of Q (visited Nov. 4, 1996) <http://www.pitt.edu/~djtst18/fan-fic/stories/love_q.txt> ("You've heard it before and you'll hear it again. Paramount owns the characters, I just play with them. I don't make any money when I play, but neither does Paramount, so that's okay.").

Noncommerciality is a harder case for printed "zines," for which publishers typically charge the cost of printing, or exchange one for another in barter. Some fandoms rejected self-publishing because of copyright concerns and authors simply sent one another stories. *See* JENKINS, *supra* note 6, at 158 (discussing *Professionals* fandom). Zines maintain the nonprofit ethos, but still are on weaker ground legally because the law generally does not look to whether an alleged infringer profited from the acts at issue but whether the acts were commercial. A nonprofit ethos can also be expressed in contradictory ways: some zines encourage copying without permission, others hold that such acts lead to unwanted commercialization. *Id.* at 160. Electronic distribution of fan fiction avoids these tricky questions, which may be in part responsible for its recent meteoric rise.

67. *See* Litman, *supra* note 2, at 40. Though the Supreme Court has rejected commerciality as the primary fair use factor, at least when there is arguably a transformative use, the argument retains appeal. *See generally* Anderson et al., *supra* note 60.

68. 510 U.S. 569 (1994).

69. *Id.* at 580 (emphasis added).

of the original. It is significant that 2 Live Crew . . . not only copied the bass riff and repeated it, but also produced otherwise distinctive sounds . . . ."[70] From alternate universes to poetry to new adventures to erotica, fan fiction contains much that is "otherwise distinctive." Furthermore, the attention that fans seek is for a noncommercial purpose, as discussed above; therefore, it seems reasonable to inquire more deeply into what, besides profit, motivates fan writing.

Any evaluation of productive use must also address the contempt and distaste in which fans are held, especially by the cultural elites from whom many of the nation's judges are drawn.[71] It is easy to say that fan fiction cannot be productive because it is cliched and derivative.[72] It is tempting to assume that copyright is about respecting authorial genius and integrity, but in these contexts it protects corporations that own copyrights in works of mass-distribution.[73] Indeed, if all popular fiction had to pass judges' tests of worthiness, it is doubtful that more than a small percentage would be found creative.

At the initial stage of copyrightability, courts, seeking to avoid such subjective judgments, have been hesitant to inquire about originality and creativity. Justice Holmes, sensitive to the nature of the common law, made the classic statement of this position:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations .... [C]opyright would be denied to pictures which appealed to a public less educated than the judge .... [T]he taste of any public is not to be treated with contempt.[74]

The test for transformative fair use should reflect these cautions.[75]

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70. *Id.* at 589.

71. *See* JENKINS, *supra* note 6, at 16–19; Fiske, *supra* note 27, at 30.

72. *Cf.* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976) (holding "Uncle Sam" bank not copyrightable in part because it did not require significant talent and skill to create).

73. *See* BOYLE, *supra* note 31, at 55 (noting disjunction between rhetoric of auteurism and reality of corporate ownership).

74. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903); *see also* Twin Peaks Prods., Inc. v. Publications Int'l, Ltd., 966 F.2d 1366, 1374 (2d Cir. 1993) (cautioning against judicial quality judgments and holding that the fact that the book "is a work of and about pop culture" does not militate against a finding of fair use); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951) ("[n]o matter how poor artistically the 'author's' addition, it is enough if it be his own"); Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 742–43 (1993).

75. To the extent that fan fiction is seen as derivative work, a higher standard for copyrightability may be applied. *See* Gracen v. Bradford Exch., 698 F.2d 300, 304 (7th Cir.

Because of the justified judicial mistrust of quality judgments, the most persuasive reading of *Campbell* is that the creation of new art is transformative use. Even if a "social benefit" test is used, the Supreme Court has resisted converting "social benefit" into a quality judgment imposed by a judicial elite. The Court has held that there are "societal benefits" in increased access to television programs that viewers are invited to watch free of charge.[76] Fan fiction is based on these very same programs. Arguably, the benefit that accrues from simply watching *Star Trek* would also flow from creative activity undertaken in homage to that program.

Further, no bright line of originality exists.[77] Television programs in particular draw on past programs for inspiration and to attract potential investors in them because they use themes that have proven successful in the past.[78] Copyright law does not and could not grant its protections according to judicially measured cultural value or requirements of absolute originality.[79]

1983). *Gracen*, however, involved a painting that used only pictorial elements already present in the movie.

76. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 454 (1984); *see also* Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966) (holding biography of Howard Hughes socially important enough to benefit from the fair use doctrine, even if it is not "profound"). The *Rosemont* court continued: "[W]hether [a work] is designed for the popular market, i.e., the average citizen rather than the college professor, has no bearing on whether a public benefit may be derived from such a work." *Id.*

77. *See* Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 438 (discussing noted literary and commercial borrowings); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990); Madow, *supra* note 10, at 197–98 (arguing that postmodern aesthetic prevents clear lines between originality, influence, theft, parody, allusion, etc.); Rotstein, *supra* note 74, at 757 ("Independent creation really means only that copyright tolerates some forms of rearticulation of previous texts, while penalizing other forms. Specifically, the law forbids those acts of textual duplication that are perceived to rely on an unduly narrow range of prior texts."); *The Curious Origin of the Drow* (last modified Jan. 3, 1996) <http://web.cs.ualberta.ca/~wade/HyperDnd/TSR/drow.html> (discussing extent to which TSR's fantasy role-playing games use materials derived from other sources); *First Inklings of Legal Research*, *supra* note 44 (containing letter from Chris Bourne stating that best-selling author Terry Pratchett admitted basing popular Discworld series on *Advanced Dungeons & Dragons* campaign); Negativland, *supra* note 21 (arguing that most artists recognize that they "steal[]" from others and discussing recent history of conceptual art).

78. *See, e.g.*, Henry Jenkins, *'Infinite Diversity in Infinite Combinations': Genre and Authorship in Star Trek*, *in* SCIENCE FICTION AUDIENCES, *supra* note 14, at 175, 183 (discussing Gene Roddenberry's reference to *Star Trek* as "*Wagon Train* to the Stars" and conscious choice to borrow from successful shows); Walt Belcher, *The X-Files*, TAMPA TRIB., July 26, 1996, at Baylife (noting that *The X-Files*' creator was inspired by an earlier show, *Kolchak: The Night Stalker*); Robert P. Laurence, *Of Hope and Gory: X-Files Has Spawned New Colony of Shows Dwelling on the Dark Side*, SAN DIEGO UNION-TRIBUNE, Oct. 13, 1996, at E1 (discussing wide acknowledgment that success of *The X-Files* inspired many similar television shows).

79. *See* BOYLE, *supra* note 31, at 163–64.

The specific content of fan fiction raises the issue of what, besides parody, can constitute transformative use. Courts protect parody because a parodist has a reason to make creative use of the *particular* text parodied, not just a desire to comment on society at large.[80] The particular work must bear significantly on the secondary work's message. In fan fiction, a particular show is chosen because that show carries unique meanings for the fan. The same expression could not be achieved in a commentary on society or culture at large.

Parody is also protected because copyright owners would often refuse to license parodies that nonetheless serve the creative purpose of copyright law. When the likely refusal is based on disapproval, not a concern for market share, fair use will often be found.[81] The next subsection argues that fan fiction meets this test as well.

Finally, it is difficult to draw clear lines between parody and other types of transformative use, including political protest. For example, in response to Fox Broadcasting's recent actions against unauthorized *Millenium* Web sites, one author posted a story, *Fahrenheit 1013*, that used the *X-Files* characters and settings to posit a nightmare world in which all forms of expression, including children's names, are owned by corporate entities, making human creativity and communication impossible.[82] Parody? Political statement? Neither? When does use of a "canon" turn from respect for the form to parody? For example, in *Star Trek*, is it parody or homage to use the truism that the poor fellow in the red shirt who beams down with Kirk, Spock, and McCoy is going to be the one of the four to die?[83] For these reasons, the fair use inquiry should not require a transformative use to be parodic to be protected.

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80. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580–81 (1994). The Court suggested that the resolution of the other factors of the fair use test bears on the stringency of the parody requirement: "[W]hen there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work's minimal distribution in the market . . . or other factors, taking parodic aim at an original is a less critical factor in the analysis . . . ." *Id.* at 580 n.14.

81. Thus, some have suggested more generally that fair use should cover any instance where owners would refuse to license use for reasons unrelated to the displacement of market share. *See, e.g.*, 2 GOLDSTEIN, *supra* note 45, § 10.2.2, at 10:64 n.160.

82. Deborah L. Wells, *Fahrenheit 1013* (visited Nov. 12, 1996) <http://web.ukonline.co.uk/members/xfilesfanficarchive.d/november96/fahr1013.txt>. The story's title, of course, evokes *another* copyrighted work about the suppression of ideas, and few would deny that this reference was a legitimate use, though not a parody. *See generally* RAY BRADBURY, FAHRENHEIT 451 (1953).

83. *See* David Bromwich, *Parody, Pastiche, and Allusion*, *in* LYRIC POETRY: BEYOND NEW CRITICISM 328, 328–31 (Chaviva Hosek & Patricia Parker eds., 1985) (arguing that parody is always also homage).

2. The Effect of the Use on the Potential Market

Copyright disclaimers also discuss the market effects of fan fiction.[84] They reflect the need to preserve creators' incentives to create, but argue that fan fiction enhances the market for official texts and products by generating further interest in them:

> This is a piece of (hopefully) original fan fiction, and in no way is meant to infringe on the copyrights of Chris Carter, Fox Television, and/or Ten-Thirteen Productions. And before they think about suing me, they should just realize that I'm in their most-valued viewing demographics, and if they take all my money away I won't be able to buy all that lovely merchandise.[85]

Fan fiction keeps its consumers excited about the official shows, receptive to other merchandise, and loyal to their beloved characters.[86]

Why believe the fans? Case law supports such a conclusion. One court has recognized that enabling consumers to play with and alter video-game characters has the potential to improve the market for the official product. In *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*,[87] the

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84. *See, e.g.*, Meerkat, *Betrayal* (last modified Oct. 20, 1995) <http://gossamer.simplenet.com/stories/ac/Betrayal> ("The characters used below ain't none of my creating, they're Chris Carter's and he's got lots and lots of lawyers so he could sue me . . . but that's bad for fandom, so he probably won't. One hopes."); *see also* Marcia Tiersky, *Comity or Tragedy?* (visited Nov. 4, 1996) <http://gossamer.simplenet.com/stories/ac/ComityOrTragedy> ("[The copyright owners] didn't say I could borrow them, but they aren't losing any money on the deal, so why should they complain?").

85. Meerkat, *By the River* (visited Oct. 22, 1996) <http://gossamer.simplenet.com/stories/ac/ByTheRiver>.

86. *See* JENKINS, *supra* note 6, at 65–66. As one author wrote: "The production of fan fiction can fuel the flames of fan interest during long spells of re-runs, and even bridge huge gaps like that between the last airing of classic *Star Trek* and the advent of the movies." Peni R. Griffin, *The Truth Is in Here* (visited Oct. 22, 1996) <http://www.geocities.com/Athens/3401/0xfiles.htm>; *see also* JOHN ASHBERY, *Daffy Duck in Hollywood*, *in* SELECTED POEMS 227, 228 (1985) (Daffy Duck states that "I have/Only my intermittent life in your thoughts to live . . . . Everything/Depends on whether somebody reminds you of me."); Joel Hahn, *Joel's Treatise* (last modified Jan. 3, 1996) <http://web.cs.ualberta.ca/~wade/HyperDnd/TSR/hahn1.html> (arguing that existence of fan-produced role-playing material requires possession of original materials for best use and enjoyment and spurs people to buy official products; citing other game companies that use this marketing strategy); Letter from Lori L. Bloomer to fictalk@chaos.taylored.com, *supra* note 7 ("[I]f anything, [fan Web sites] offer new fans more reasons to continue enjoying the show through providing background on past episodes . . . and yes, fan-authored fiction . . . . Without those sites, I don't know if I'd have been as likely to stick with the show."); *cf.* Georgini, *supra* note 2, at 1192–93 (arguing that works predicated on copyrighted originals could stimulate market for primary text and thus should be protected).

87. 964 F.2d 965 (9th Cir. 1992).

Ninth Circuit held that a computer program that allowed Nintendo players to change character attributes was a fair use, in large part because it had the potential to improve the market for the original by adding variety to it.[88] Under current precedent, when a use is noncommercial, there is a presumption against finding significant market harm.[89] There is also a presumption against market harm when the use is transformative, because transformation precludes simple market substitution.[90]

Quite possibly, fan fiction could affect the market for derivative works, such as novelizations of shows. The Supreme Court has noted that "[t]he market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop."[91] There are several reasons to conclude that fan fiction does not fall within such a market. The nature of most fan fiction, which explores plot and situation possibilities generally refused by copyright owners, is such that it is unlikely to interfere with officially authorized publications.[92] Romances, interior monologues, humor, vignettes, poetry, songs, and stories in which a main character dies would not support an official market. This is

88. *See id.* at 967.

89. *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 427 (1984). The burden is on the plaintiff to prove that the specific use is harmful, or would be if it were widespread. *Id.*

90. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994).

91. *Id.* at 592. Thus, even using a private-benefit-oriented analysis, courts have been reluctant to protect copyright owners' non-copyright interests. *See* Hustler Mag., Inc. v. Moral Majority, Inc., 796 F.2d 1148 (9th Cir. 1986) (holding that use of *Hustler* parody sharply critical of Jerry Falwell to generate outrage against *Hustler* did not hurt the original's market because *Hustler* would not have exploited the relevant market); 1 GOLDSTEIN, *supra* note 45, § 10.1.1, at 10:5–:6; William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 689–90 (1993) (arguing that the fair use defense should apply when copyright owner would not license use for noneconomic reasons, e.g., disagreement with message).

92. *See* JENKINS, *supra* note 6, at 162–77. Most fan fiction is shorter than novel-length; even the longer works tend to focus on character development rather than plot, as officially authorized books do. *See* JACQUELINE LICHTENBERG ET AL., STAR TREK LIVES! 226–27 (1975). *Compare* CHARLES GRANT, WHIRLWIND (1996) (official *X-Files* novel) *with* Livengoo & Amperage, *Oklahoma*, (visited Mar. 9, 1997) <http://gossamer.simplenet.com/stories/or/Oklahoma.1> (*X-Files* fan novel). It is also extremely unlikely that copyright owners would attempt to develop the market for "slash," or homoerotic stories, featuring their characters. *See Slash Fan Fiction on the Net* (visited Oct. 22, 1996) <http://members.aol.com/ksnicholas/fanfic/slash.html> (listing dozens of Web sites offering such fiction).

Nor would owners be likely to develop the market for parodies or poetry and songs about their characters. Similarly, given the uneconomic nature of short story publishing, it is unlikely that an owner would make a serious attempt to develop a market for stories of the modest length generally found in fan fiction. In addition, it is unlikely that copyright owners would market fan fiction based on canceled shows (*see* JENKINS, *supra* note 6, at 120–51 (discussing *Beauty and the Beast* fan fiction)), without being assured of a much greater market than the relatively small fan community.

especially true because fan fiction often imagines rather earthshaking changes for the characters—marriage and death, among others—that the "canon" cannot accept without signaling the end of the show.[93] So long as such stories are *not* official, they retain their appeal because the characters return unscathed in the next episode or official form. Additionally, because fan fiction on the Web is essentially free, it does not use any monetary resources a reader might put aside for fiction consumption. Where distribution is free, the readership cannot prove that a viable market exists. Having to pay anything might deter almost everyone from reading, thus leaving copyright owners no better off.[94]

Copyright law does not grant copyright owners exclusive rights to all markets for their goods. One must define the market to which a copyright owner is entitled before deciding whether there is a significant market effect.[95] In *Sony*, the dissent pointed out that the very existence of time-shifting through home copying suggested the existence of a market for the activity.[96] The majority seems to have concluded that allocating a right to the relevant market to the copyright holders would suppress too much of that market.[97] Similarly, transaction costs involved in individual authors' gaining permission for stories written without hope of profit (and often

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93. *See* Ilsa J. Bick, *Boys in Space: Star Trek, Latency, and the Neverending Story*, *in* ENTERPRISE ZONES, *supra* note 21, at 189, 206 (discussing guidelines for official *Star Trek* books prohibiting any evolution of characters or situation).

94. *Cf.* GOLDSTEIN, *supra* note 45, § 10.2.2. at 10:61 n.144 ("When, as in *Sony*, the use is noncommercial and decentralized, the presumed absence of harm will often be warranted, since the relatively low degree of harm to plaintiff, taken together with high detection and negotiation costs, will characteristically prevent a market from forming.").

Even printed zines are unlikely to serve as a market substitute. Most zines are far more expensive than comparable official products because they lack economies of scale; fans have to *want* the unofficial versions for nonmarket reasons. *See* JOAN MARIE VERBA, BOLDLY WRITING: A TREKKER FAN AND ZINE HISTORY, 1967–1987, at 4, 82 (1996).

95. *See* Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973):

> It is wrong to measure the detriment to plaintiff by loss of presumed royalty income—a standard which necessarily assumed that plaintiff had a right to issue licenses. That would be true, of course, only if it were first decided that the defendant's practices did not constitute "fair use." In determining whether the company has been sufficiently hurt to cause these practices to become "unfair," one cannot assume at the start the merit of the plaintiff's position . . . .

Id. at 1357 n.19.

96. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 497–98 n.50 (1984) (Blackmun, J., dissenting).

97. The transaction costs of a decision favoring the copyright owners would involve some combination of copy protection, requiring people to go to the video store to see a missed episode of a TV show, and a compulsory licensing fee paid by VCR and videotape manufacturers, which would presumably be passed on to consumers, raising their prices.

after a hard day's work) may well justify placing fan fiction outside of the copyright owner's market.

There is historical evidence that less-than-absolute copyright does not hurt copyright owners. Lack of copyright protection, especially for derivative works, stimulated investment and creativity in new technologies, including phonographs, radio, television, videocassette recorders, cable, and even the Internet itself.[98] The entertainment industry is profitable and will survive without the need to suppress fan fiction.[99]

For example, *Star Trek*'s official derivative works are thriving; an official *Star Trek* novel is sold every thirteen seconds.[100] Indeed, since July 1986, thirty consecutive 'Star Trek' novels have been *New York Times* best sellers—the longest consecutive streak of any series in publishing history.[101] This success coexists with the enormous amount of print and Internet *Star Trek* fan fiction available, and provides strong evidence against the claim that fan fiction fills the same market niche as official fiction. Paramount recognizes the role of fan support in *Star Trek*'s success, and has hired fan liaisons and conceded fan authors' rights to copyright their own work.[102] *Star Trek*'s creator, Gene Roddenberry, approved of fan uses:

> I have no objection to plays similar to *Star Trek* or even identical to *Star Trek* if done by students or community groups on a nonprofit basis as long as appropriate credit is given to the source material and individuals .... I have no objection to it

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98. *See* BETTIG, *supra* note 5, at 4; Litman, *supra* note 2, at 27–29 & n.32.

99. *See Sony*, 464 U.S. at 454 (quoting with approval trial court's findings that entertainment industry's profitability demonstrated that home copying for personal use was fair use).

100. *See* Steve Hockensmith, *Science Friction: Serious Devotees Are Light-Years Behind 'Star Wars' and 'Star Trek' in Quest for Public's Attention*, CHI. TRIB., Oct. 8, 1996, at C1. Other spinoff novels also routinely sell well, particularly *Star Wars* novels, and their numbers are growing. *Id.*

101. Colin Covert, *'Star Trek' Has Produced a Galaxy of Spinoffs on Its 30-Year Mission*, STAR TRIB., Aug. 6, 1996, at 2E. Similarly, *Star Wars* novels—drawing on another series with a well-entrenched fan culture—have spent 130 weeks on the *New York Times* best-seller lists, surpassing novels written by well-known authors Michael Crichton and John Grisham. *See* Valerie Takahama, *Call It 'Star Wars' and the Force Is with You*, ORANGE COUNTY REG., June 4, 1996, at F4.

102. *See, e.g.*, LICHTENBERG ET AL., *supra* note 92, at iv–v (official book crediting previously published and copyrighted fan fiction); STAR TREK: THE NEW VOYAGES iv (Sondra Marshak & Myrna Culbreath eds., 1976); STAR TREK: THE NEW VOYAGES 2, at iv (Sondra Marshak & Myrna Culbreath eds., 1978); *see also* JEAN LORRAH, THE IDIC EPIDEMIC (1988) (popular fan author's official *Star Trek* novel). For general discussion of Paramount's accommodation with fans, see VERBA, *supra* note 94; Jenkins, *supra* note 78, at 188, and letter from Lori L. Bloomer to fictalk@chaos.taylored.com., *supra* note 7.

> involving some profit as long as that profit is used in the interest of that community theatre program.[103]

Paramount concurred, writing to a fan that "Paramount is familiar with several fanzines, and as such find them to be a 'fair use' of *Star Trek*, which we can only hope to encourage."[104] Paramount ignores fan publications, and only initiates legal action against commercial products.[105] Paramount has taken advantage of fan appropriation to strengthen its market position and build loyalty.

Other copyright owners have also concluded that it is in their interests to allow original fan creativity while drawing the line at direct copying.[106] The example of role-playing games, which require players to elaborate on official characters and situations, is instructive. While the publisher of *Advanced Dungeons & Dragons* asserted control over all fan creativity on the Internet,[107] FASA Corporation, another role-playing game publisher, asked fans to use this disclaimer: "Original Shadowrun material Copyright 1994 by FASA Corporation. All Rights Reserved. Used without permission. Any use of FASA Corporation's copyrighted material or trademarks in this file should not be viewed as a challenge to those copyrights or trademarks."[108] Chaosium, another publisher, requested a similar disclaimer: "[W]e are happy to see people write material for our games, and don't have a problem with gamers sharing their original work and making it available to others in a not-for-profit manner."[109] Steve Jackson, owner of Steve Jackson Games, wrote:

> If you're creating a fanzine, or sharing your own original stories online, then more power to you. We think it's great . . . . If you do create something neat, it would be a courtesy to send our

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103. VERBA, *supra* note 94, at 7.

104. *Id.* at 44 (quoting letter received by fan author).

105. *Id.* at 44, 62. The corporation's tolerance for fan fiction also contrasts with its aggressive action against fan *copying* of official images and scripts, demonstrating that Paramount has taken a calculated stand. *See* Bill Frischling, *No Free Enterprise*, WASH. POST, Nov. 28, 1996, at B7.

106. *See Poohbear* (visited Nov. 16, 1996) <http://charon.nmsu.edu/~mcarlson/wtp.html> (noting that copied Winnie-the-Pooh art was removed after receiving a letter from the copyright owner, but continued displaying original Pooh art).

107. *See TSR's Letters to an FTP Site*, *supra* note 7.

108. *Policies of Other RPG Publishers* (last modified Jan. 3, 1996) <http://web.cs.ualberta.ca/~wade/HyperDnd/TSR/other.html>.

109. *Id.* Chaosium also asked for this sentence: "Any commercial use of Chaosium Inc.'s copyrighted material or trademarks without Chaosium Inc.'s express permission is prohibited." *Id.*

> webmaster a copy and give YOUR permission for us to archive it on our own system for our users to enjoy.[110]

If fan fiction has no measurable adverse market effect, and may strengthen fan commitments, why would a corporation seek to restrict its production? Corporations that attack fan fiction may have confused copyright law with trademark law. These corporations mistakenly fear that failure to contest any use of their creations would weaken their claims against possible commercial appropriation.[111] Although others may believe fan fiction causes economic harm,[112] the most likely reason corporations have attacked fan fiction is almost certainly a desire to control how their characters are portrayed.[113]

Copyright owners, of course, have legitimate concerns about control over the images of their characters.[114] But owners cannot choose whether reviews will be biting or laudatory, or whether parodies of their work will be flattering or scathing. Indeed, the more clearly a parody departs from the copyright owner's vision, the more likely it is that fair use will be found. Once a work of secondary creativity qualifies as fair use, the copyright owner's objections no longer matter.

The idea of preserving a creator's rights over a character's image is particularly problematic in the context of popular entertainment, where

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110. *Id.*

111. *See id.* (containing letter from Game Designers Workshop making this error); *see also* GOLDSTEIN, *supra* note 45, § 9.3, at 9:11–:13 (noting that copyright is not abandoned by failure to contest others' uses). The fair use doctrine could not exist if copyright could be lost in the way that trademark can be, by failure to assert complete dominion over it.

112. See *infra* Part IV.C for a discussion of possible ways to alleviate copyright owners' main concerns.

113. This motive explains most of the actions against fan fiction of which fans are generally aware. *See* VERBA, *supra* note 94, at 39, 55–56 (discussing Lucasfilm's attempt to limit only *Star Wars* fan fiction portraying same-sex relationships); *Forever Lost* (last modified Jan. 3, 1996) <http://web.cs.ualberta.ca/~wade/HyperDnd/TSR/forever.html> (containing list of FTP sites with creative material, including fan stories, that were "not PG-13" rated and thus were removed from the Web); *Key Questions of the Debate* (last modified Jan. 3, 1996) <http://web.cs.ualberta.ca/~wade/HyperDnd/TSR/ques.html> (containing letter from TSR's licensed FTP site stating that fan materials "that are not permitted or not appropriate will be deleted, no questions asked"); Letter from Leigh M. to slashpoint@ucdavis.edu, *supra* note 7 (discussing similar attempt by *Quantum Leap* producers); *see also* GAINES, *supra* note 7, at 229 (describing use of copyright to suppress particular, disfavored messages); Eckenwiler, *supra* note 9, at S29 (same).

114. *See, e.g.*, Ross Kerber, *Vigilant Copyright Holders Patrol the Internet*, WALL ST. J., Dec. 13, 1995, at B1.

large corporations own rights that the original creator has sold.[115] Judge Kozinski defends a company's right to control its characters:

> [I]f we open up the field and allow ... characters to be portrayed by someone other than the company that created them, they will become different characters .... Batman and Superman, for example, have changed: they're not the same Batman and Superman I was reading about in 1964. I'm kind of sorry, because I liked the old Batman ....[116]

The changes in Batman and Superman, though, occurred because the characters' corporate owners hired new artists to continue the lucrative series while vigilantly policing their copyrights. Even before readers begin to interpret texts,[117] copyright does not ensure the integrity of an author's vision. Once a text reaches readers, the copyright owner loses control over its interpretation.[118]

Moreover, the interest in the integrity of characters is not an interest in market share, but a general reputational concern, which copyright law does not formally recognize.[119] One can have a soft spot for the Superman and Batman of yore and still apply standard fair use tenets, under which transformative, noncompeting use is favored. The price of widespread popularity is a loss of control over reception. Consider President Ronald Reagan's appropriation of Bruce Springsteen's cynical "Born in the USA" as a patriotic anthem for conservatism. Was Springsteen's integrity abused, or was this a natural result of the song's dissemination in a diverse culture?[120] Also relevant in this regard is the recent extension of "moral

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115. This is not to say that a corporation's owners and managers cannot share an ethos of respect for characters and desire to protect them, as the Walt Disney Company surely does. *See* Helfand, *supra* note 34, at 628; *see also* Edgar Rice Burroughs, Inc. v. High Soc'y Mag., 7 Media L. Rep. (BNA) 1862, 1863 (S.D.N.Y. 1981) (protecting the Tarzan character from insulting adult satire). The more an owner objects to the content of another's use of a character, however, the more legal prohibitions on use smack of censorship and evoke a countervailing public interest in critical or humorous commentary on others' creations.

116. Alex Kozinski, *Mickey & Me*, 11 U. MIAMI ENT. & SPORTS L. REV. 465, 469 (1994).

117. In *Universal City Studios v. Nintendo*, 578 F. Supp. 911, 923 (S.D.N.Y. 1983), *aff'd*, 746 F.2d 112 (2d Cir. 1984), the court held that King Kong did not signify a single source to consumers, because so many different corporations had been involved in exploiting the character. Popular characters such as the heroes of *Star Trek*, *Batman*, the characters in *Friends*, and so on, are in similar situations. The fragmentation of the official representation of characters further diminishes the moral claims of copyright holders to control every appearance of their characters.

118. *See supra* notes 19–21 and accompanying text.

119. Trademark law does recognize reputational concerns, but copyright's special solicitude for parody demonstrates that its concern for creativity requires a different kind of analysis.

120. Mr. Reagan used the song in a political context, but fan fiction is also political in the sense that it expresses utopian and oppositional attitudes and is particularly important for women and other marginalized groups who have trouble expressing themselves in the dominant culture.

rights" to fine visual artists, allowing them to prevent prejudice to their honor or reputation caused by destruction or mutilation of their original or limited-edition works of recognized stature, even after sale.[121] Despite intense lobbying by some in the motion picture industry, Congress refused to extend such protection to mass media.[122] This congressional distinction between individual works of art and mass-produced creativity supports the contention that widely distributed characters "belong" in part to the audiences who make them hits. As the next section discusses, fan disclaimers dissociate fan fiction from the official product, allowing copyright owners to preserve the integrity of the "true" canon.[123]

Fundamentally, the issue of character integrity is a dispute about how much control companies should exercise over how their images are received. If a line is *not* drawn at noncommerciality when it comes to creative re-use of characters, then a fan's daydream is theoretically as illegitimate as the story she posts on the Web. The regime implied by this interpretation would clearly be impossible to enforce and equally difficult to respect. The difficulty of confining imagination suggests that, painful as it is for authors to see their creations "misread," a rational copyright law should err on the side of creative use. A copyright law that favors new works, furthermore, fulfills the constitutional mandate to allocate rights for the public good.

3. The Remaining Factors

Under the second fair use factor, fictional sources get more protection than facts. Like parody, though, fan fiction is unlikely to be written about

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See JENKINS, *supra* note 6, at 185–222; Constance Penley, *Feminism, Psychoanalysis, and the Study of Popular Culture*, *in* CULTURAL STUDIES 479 (Lawrence Grossberg et al. eds., 1992) (discussing sexual politics of homoerotic fan fiction).

121. *See* Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (1994).

122. *See* BARRETT, *supra* note 45, at 527.

123. *See infra* Part IV.B. An analogous case might be *Reddy Communications, Inc. v. Environmental Action Found.*, 477 F. Supp. 936 (D.D.C. 1979), a trademark case in which a nonprofit group used the plaintiff's "Reddy Kilowatt" character to criticize utility companies. The court found no likelihood that the public would be confused or think that the plaintiff endorsed the use. Fan fiction is similarly confined to an interest group, not sold on newsstands. Furthermore, because it reaches a specialized audience that is competent to distinguish "official" from "unofficial" productions, fan fiction authors may be in the same position as the Environmental Action Foundation, whose specialized audience protects it from liability.

Since fan fiction is written rather than pictorial, readers may be more able to dissociate the official from the unofficial product than they are when images are at issue. *See* Nevins, *supra* note 34, at 310.

factual narratives; therefore, this fair use factor may simply be irrelevant to the analysis.[124]

The published/unpublished distinction of the second factor is instructive. The fan community exists in large part because people have been invited to watch television shows free of charge. One can become a fan without much, if any, initial investment, as friends urge each other to watch new shows.[125] The special protection for unpublished works is based on the idea that the copyright owner has an interest in limiting dissemination. This factor supports giving less protection to a work that had been broadly distributed, because such works are at the other end of the continuum from closely-held works.[126]

Analyzing the third fair use factor, the amount and substantiality of the portion used, is difficult. If a character can be copyrighted, then use of the character might be deemed use of the entire copyrighted material. But characters cannot be copyrighted in themselves; they only merit protection when they are sufficiently delineated in a copyrighted work. Their use might thus be deemed to involve only a part of another's creation. No court has yet addressed this issue. Instead, courts upholding protection for characters have generally held that the character constitutes the story being told, consistent with the "Sam Spade" case: the allegedly infringing work is held to contain only copyrighted material, with no original

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124. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994). Fans do, however, speak of the characters as having real existence, which in some ways enacts the postmodern critique of the fact/fiction dichotomy. *See, e.g.*, Letter from Sue Love to alt.startrek.creative (Nov. 3, 1996) (on file with author) ("Paramount owns the rights to Star Trek, the characters and the show. The logs of Tom Paris [a character] are public record since his death last month."); *see also* JENKINS, *supra* note 6, at 18 ("Fans seemingly blur the boundaries between fact and fiction, speaking of characters as if they had an existence apart from their textual manifestations, entering into the realm of the fiction as if it were a tangible place they can inhabit and explore."); *id.* at 50–85 (describing process by which fans make texts "real" by investing emotional energy in them and devoting critical attention to them); Coombe, *supra* note 19, at 300 (arguing that the fact/fiction line is a contestable convention).

125. *See* JENKINS, *supra* note 6, at 40, 70.

126. *See* 1 GOLDSTEIN, *supra* note 45, § 10.2.2, at 10:53 ("It is the copyright owner's efforts to keep its work closely cabined, and not technical measures of publication, that determine the special protection from the fair use defense.") (citation omitted). *Cf.* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 446 n.28, 449–50, 454 (1984) (citing that free broadcast of shows whose copying was at issue is partial justification for a finding of fair use).

For characters no less than people, the price of fame is a certain loss of control over one's image. *Cf.* Hustler Mag. v. Falwell, 485 U.S. 46 (1988) (holding that, for a public figure, a tort claim against scatological parody requires proof of actual malice, though private figures face fewer hurdles).

contribution.[127] This analysis sidesteps the question of how much was taken from the copyright holder.

Even assuming the character itself is a whole work, metaphysical questions remain. Have fan authors appropriated the entire character, or taken just the name and some attributes? Does it depend on how in-character that character behaves? Is a poor portrayal more of a fair use? Does completely altering the setting matter, for example, placing the *Star Wars* characters on present-day Earth? These definitional problems suggest that the third factor is too indeterminate in a productive use context to be weighed heavily.

The Supreme Court has held that, where a free broadcast is concerned, the use of an entire work "does not have its ordinary effect of militating against a finding of fair use."[128] The Court has also held that the substantiality of the use should be evaluated in light of whether it is "reasonable in relation to the purpose of the copying,"[129] an inquiry that is intertwined with the first and fourth factors. Thus, even wholesale borrowing might well be legitimate if, as with fan fiction, the use is transformative, noncommercial, and not a market substitute.

B. Beyond Case Law: The Relevance of Copyright Disclaimers

Many fan authors are aware that their disclaimers do not protect them against claims by the copyright owners.[130] Thus, pleas to the copyright owners not to sue an author are common: "[I]mitation is the sincerest form of flattery, so please don't sue me for expressing my love for 'The X-Files' this way."[131] Such pleas would be unnecessary if the disclaimers were thought sufficient to avoid liability for copyright infringement.

Even if legally ineffective, copyright disclaimers serve an important nonlegal function. Fans are using statements about law to speak about themselves as consumers *and* producers of images. They are asserting both their allegiance to the media creations they enjoy and also their distance

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127. *See, e.g.*, Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978).

128. *Sony*, 464 U.S. at 450.

129. *Campbell*, 510 U.S. at 586.

130. *See, e.g.*, Letter from Kyle Dane to alt.tv.x-files.creative (Nov. 10, 1996) (on file with author) (proposing standard disclaimer stating, "This is a legal thing that probably wouldn't hold up in court, but better to have it than not.").

131. Wendy K. Shapard, *A Sea of Troubles* (visited Dec. 2, 1996) <http://gossamer.simplenet.com/stories/st/SeaOfTroubles>; *see also Frogs* (visited Nov. 17, 1996) <http://www.northwestnet.com/company/staff/brandon/stories/frogs.html> ("This is NOT meant to infringe upon the copyright of the creators of the real Blackadder. (If this is distributed elsewhere beyond my control, I'm not getting any money from it—please, don't sue.)").

from the official texts.[132] As fans, they recognize their subordinate status—they are just "borrowing" the characters.[133] Fans recognize that they may not write "canon," but can only evoke alternate possibilities.[134] Copyright disclaimers allow fans to assert their intermediate positions, which are indebted to, but fundamentally separate from, the corporations that own their beloved shows.[135] In addition, the acknowledgment of a common source serves to reinforce the communal aspects of fandom. As one author wrote, giving credit is "like playing the national anthem before the game."[136] The story is the author's, but the reason readers read is their shared interest.

The disclaimers, as discussed above, express a general belief that fan fiction is fair use. Fans announce their conviction that, in a just world, their contributions would be recognized as a beneficial tribute to the copyright holders. Through custom and practice, fans are creating a common law of fair use, whose reach will in all likelihood escape total corporate control.

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132. *See* Jenkins Interview, *supra* note 21, at 277 (statement of Taylor Harrison).

133. *See, e.g.*, *The Field Where I Lied* (visited Nov. 16, 1996) <http://web.ukonline.co.uk/members/xfilesfanficarchive.d/november96/fieldlie.txt> ("I have borrowed the characters and situations of the television program ["The X-Files"] and will be returning them no worse for the wear.").

134. *See* VERBA, *supra* note 94, at 25, 48, 63 (quoting fan statements that only official versions are "true").

135. *See, e.g.*, Cynthia Johnson, *Millstones—Part One: Tension* (visited Oct. 22, 1996) <http://nycmetro.com/Bobbi/mills.htm>:

> [T]hese [characters] are the brainchildren of Chris Carter, to whom these stories are written with the utmost respect. The fun of these stories is that they offer what Chris Carter cannot without compromising the integrity of his characters and his fantastic show. So we're not muscling in, Chris! We're just embellishing a little for the fun of it.

Id. See also id. (suggesting in jest that *The X-Files* is owned by the tobacco industry, which is owned by oil companies, which are owned by the Vatican); Weekes, *supra* note 64 ("Duncan, Brisco, and most everyone else mentioned in Timelines belongs to huge, faceless corporations who, while unable to stamp out fanfiction completely, smack their lips greedily in anticipation of destroying anyone who makes so much as one red cent off their people."); JENKINS, *supra* note 6, at 23–24:

> While fans display a particularly strong attachment to popular narratives, act upon them in ways which make them their own property in some senses, they are also acutely and painfully aware that those fictions do not belong to them and that someone else has the power to do things to those characters that are in direct contradiction to the fans' own cultural interests.

Id. at 24. Thus, gratitude and resentment often mingle in disclaimers.

136. Letter from Sheryl Martin, fan author, to Rebecca Tushnet (Oct. 19, 1996) (on file with author).

One factor not explicitly included in the statute, but relevant to real-world practice, is that of proper attribution.[137] Through disclaimers, fan authors express their sense that credit must be given where it is due, to the creators of the characters borrowed. This ritual demonstrates a concern for avoiding plagiarism or self-aggrandizement while preserving space for creativity.[138]

In *Pillsbury Co. v. Milky Way Productions*,[139] the court considered an issue of *Screw*, a pornographic magazine, containing pictures of characters resembling the "Poppin' Fresh Doughboy" and "Poppy Fresh Doughgirl" engaged in sexual acts. The court upheld a fair use defense for the copyright claims, largely because it found that there was no market substitution. The context was so different from the official context that the public would not be deceived and would understand the humor involved in the simulation. The contexts in which fan fiction is encountered differentiates it from its official "originals." Ritual disclaimers establish for authors and audiences that fan fiction can neither compete with nor be mistaken for "the real thing." Correct attribution helps prevent confusion and preserves the market for the official product and bears an indirect relation to the fourth fair use factor.[140]

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137. *Cf.* PAUL GILSTER, THE INTERNET NAVIGATOR 33–36 (2d ed. 1994) (discussing general "netiquette," which requires proper attribution of quoted material and accepts only non-commercial copying); Georgini, *supra* note 2, at 1206–07 n.161 (stressing importance of correct attribution); *My Own Intellectual Property Story* (visited Nov. 16, 1996) <http://www.muchmusic.com/muchmusic/cyberfax/trademarkirony.html> (defending anti-plagiarism norms while arguing against expansive copyright protection).

138. *See* Letter from Valoise Armstrong to fictalk@chaos.taylored.com (Nov. 6, 1996) (on file with author) ("[I]t would seem intellectually dishonest not to acknowledge the creators of portions of a creative work not original to the author, even though we all know where they come from."); Letter from D. Joan Lieb to fictalk@chaos.taylored.com (Nov. 7, 1996) (on file with author):

> I think a disclaimer is a courtesy. It may not stand up in court, but as an author I personally feel I would be dishonest—committing an act tantamount to plagiarism—if I didn't include a disclaimer. Not that anyone is actually going to assume that I created Mulder and Scully . . . .

Id. Cf. Helfand, *supra* note 34, at 670–71 (suggesting similar system of disclaimers for commercial works using characters whose copyright has lapsed to replace trademark protection); Leslie A. Kurtz, *The Methuselah Factor: When Characters Outlive Their Copyrights*, 11 U. MIAMI ENT. & SPORTS L. REV. 437, 450–51 (1994). *But see* Kozinski, *supra* note 116, at 468 (recounting an example of persistent consumer confusion as to source); Kurtz, *supra*, at 451–52 (same); Helfand, *supra* note 34, at 671 (arguing that, with certain well-known characters, association with creator is such that disclaimers will never be effective).

139. 8 Media L. Rep. (BNA) 1016 (N.D. Ga. 1981).

140. *Cf.* Litman, *supra* note 2, at 47 (arguing for "truthful disclaimer" identifying altered documents and for citations to the original work to protect the authors' integrity rights).

C. What Kind of Protection Does Fan Fiction Deserve?

It is important to remember the distinction between copyrightability and infringement when discussing the legal status of fan fiction. Fan fiction may not be copyrightable, but that does not make it an infringing use any more than a book reviewer's inability to copyright the quotes she uses makes her use unfair.

Gracen v. Bradford Exchange[141] illustrates the problem. Gracen entered a contest that asked for paintings of Dorothy in Oz. The defendant told the contestants, "[y]our interpretation must evoke all the warm feeling the people have for the film and its actors. So, your Judy/Dorothy must be very recognizable as everybody's Judy/Dorothy."[142] Gracen's paintings won the contest because passers-by at a shopping center liked them best. When Gracen could not agree on payment with the defendant, the defendant hired another artist to reproduce her painting for its commemorative plates. The court held both that Gracen could not copyright her painting of Dorothy and that her painting might be a copyright infringement.[143] But Robert Rotstein argues that:

> Gracen's painting asked the viewer to participate in the actualization of (that is, the creation of) the text by bringing his or her own vision of the *Wizard of Oz* . . . to the experience of the paintings . . . . Moreover, the paintings arguably served a useful cultural and social goal by permitting the audience to participate in a new and fresh rearticulation of popular myths.[144]

Even if *Gracen* is correct in a commercial context, the value of popular participation justifies some protection for secondary creativity.

To prevent fan authors from claiming their ideas have been stolen by the original copyright holder, it makes sense to hold that fan fiction cannot itself be copyrighted, but that conclusion does not require the further step of considering fan fiction an infringement.[145] Indeed, the law could allow

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141. 698 F.2d 300 (7th Cir. 1983).

142. *Id.* at 301.

143. *See id.* at 303–05.

144. Rotstein, *supra* note 74, at 752.

145. Some fan authors do claim to own whatever original material or plot they contribute. *See, e.g.*, Brenda Antrim, *Paris Nocturne* (visited Nov. 24, 1996) <http://aviary.share.net/~alara/startrek/adult/voy/ParisNocturne> ("Paramount has the rights to the characters and the universe, but the story is mine. No copyright infringement intended against anyone."); Ashley Calvert, *The Girl* (visited Nov. 22, 1996) <http://www.hexwood.com/duesouth/stories/drama/Girl.txt> ("All characters, names, titles, and all other related items are property of Alliance and CBS. I did not create them; however, the following story is mine."); Sarah A. Houghton, *The Awakening (or, How I Recovered from War*

fan authors to copyright their writings and hold that the original copyright holder has a unique privilege or implied license to use them.[146] There is no reason fan authors should receive all or nothing when intellectual property law is replete with partial rights.

This conclusion rejects the holding in *Anderson v. Stallone*.[147] Anderson sent Sylvester Stallone a script treatment he hoped would be used to make the movie *Rocky IV*. It was not, and he sued Stallone for using his ideas. The court held that Anderson was a copyright infringer because he used the characters and settings from the first three movies. *Anderson* contradicts the standard industry practice of television writers, who circulate unsolicited scripts for popular shows to demonstrate their mastery of the form. The entertainment industry relies on this practice to find new talent. The *Anderson* court was mistaken in assuming that Anderson's work had to be *either* infringing *or* copyrightable as against Stallone. The court's opinion is pervaded with the rhetoric of moral judgment.[148] The

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VII) (visited Oct. 22, 1996) <http://www.fkfanfic.com/fanfic/t/thea1960.txt> ("Forever Knight is the property of USA Network, the Sci-Fi Channel, and maybe J. Parriott . . . . The representation of the author and the character of Andree Toscani are owned by Sarah A. Houghton, and may not be used without permission.").

The largest *X-Files* mailing list recently changed its proposed disclaimer to avoid this issue, advising authors to claim nothing:

> This work contains characters and situations of the television series "The X-Files," which are the creations and intellectual property of Chris Carter, Ten-Thirteen Productions, and FOX Broadcasting Co. The author makes no claim to ownership over these elements, and this work should be distributed only in a free manner without promoting monetary gain.

Letter from Gil Trevizo, maintainer of x-files-fanfic mailing list, to fictalk@chaos.taylored.com (Nov. 13, 1996) (on file with author).

A benefit of establishing fan fiction's legal status might be to protect copyright owners against claims that they have "stolen" a fan's idea. This could alleviate much corporate uneasiness about secondary creativity. *Babylon 5*'s creator has requested that fan fiction remain unpublished until the series ends, demonstrating that this concern only applies to series currently in production.

146. *See* Alexei Kosut, *And Back to the Finish* (visited Oct. 22, 1996) <http://www.dal.net/b5/s/two/And.Back.to.the.Future.txt> ("All rights will be transferred to J. Michael Straczynski, Babylonian Productions Inc., or the Prime Time Entertainment Network upon request."). *Gracen* contains reasoning that could support such a nuanced rule. Judge Posner wrote that "especially as applied to derivative works, the concept of originality in copyright law has as one would expect a legal rather than aesthetic function—to prevent overlapping claims." *Gracen*, 698 F.2d at 303. If the copyright owner could trump everyone else's claims, but a derivative creator could defend her own work against third parties, Judge Posner's reasoning would still apply. *But see* sources cited *supra* note 100 (discussing Paramount's concession of copyright to fan authors).

147. 11 U.S.P.Q.2d (BNA) 1161 (C.D. Cal. 1989).

148. *Anderson*, 11 U.S.P.Q.2d at 1162 (holding that Anderson "bodily appropriated" the characters; characters that he "lifted lock, stock, and barrel" from earlier movies). The metaphor of bodily appropriation is particularly suggestive, since it implies that the fictional character of Rocky Balboa exists in a tangible way, no less fixed and knowable than any other citizen.

court's belief that Anderson was not a true creator may explain its willingness to condemn him as an infringer. In addition, since Anderson was the party seeking compensation, the question of fair use as a defense did not arise.

V. CONCLUSION

Why should lawyers care what individual authors say and do about copyright law? Litman has suggested that copyright law fails to address emerging technologies that empower individuals because copyright law has ignored individual behavior for so long.[149] She argues that current law encourages ordinary people to conclude that copyright law simply does not apply to what they do.[150] Working outside the law's field of vision, most people act on concepts of fairness rather than on a well-defined understanding of legality. Litman proposes that good copyright rules should "first, preserve some incentives for copyright holders . . . ; second, make some sense from the viewpoint of individuals; third, [be] easy to learn; and fourth, seem sensible and just to the people we are asking to obey them."[151] Recognizing the legitimacy of fan fiction on the Internet is a good starting point.

Copyright disclaimers are manifestations of democracy in action; articulating norms about justice in the shadow of formal law. Realistically, authors know the worst that could happen to them is that they will be required to cease disseminating their stories to the public at large. With no real risk of monetary liability, only their sense of fairness constrains what they write. Therefore, copyright disclaimers express a truly popular justice, an understanding of intellectual property law more relevant than any case between two corporate giants.

Laws should, wherever practicable, make sense. In a democracy, a girl who writes Barbie stories and shares them with her friends does not fit the traditional profile of a lawbreaker. Even when she e-mails her friends via the Internet, her productive, noncommercial use of copyrighted

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149. *See* Litman, *supra* note 2, at 22–23; *see also* GAINES, *supra* note 7, at 10 (arguing that law has been unsympathetic to public culture and to claims not involving profit-making situations).

150. *See* Litman, *supra* note 2, at 23–24 n.16 (citing studies about personal-use copying).

151. *Id.* at 39; *see also* BETTIG, *supra* note 5, at 236–37 (discussing similar customs in music business); DOROTHY E. DENNING & HERBERT S. LIN, RIGHTS AND RESPONSIBILITIES OF PARTICIPANTS IN NETWORKED COMMUNITIES 93 (1994) (suggesting that ethics of fair use are evolving through practice and consensus); 1 GOLDSTEIN, *supra* note 32, at 33; Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 343–44 (1996) (suggesting that interactions in cyberspace can create a democratic culture).

characters should be protected. When the law allows people to tell stories amongst themselves but to no one else, it does not draw a respectable line between legality and illegality. This gray area disrupts productive human interactions.[152] When copyright law is enforced by corporate lawyers asserting the broadest possible rights, the general regime of copyright law is weakened. This is demonstrated by the outraged reaction of thousands of fans responding to a shutdown of a Web site (not containing fan fiction) based on the television show *Millenium*. Many fans asserted absolute free speech rights to use images posted on the World Wide Web.[153] Fox asserts that it could, but will not at present, act similarly against fan fiction. Such broad claims can only exacerbate the average citizen's frustration with and perhaps rejection of copyright law as a whole.

People should be able to participate actively in the creative aspects of the world around them.[154] When most creative output is controlled by large corporations, freedom to modify and elaborate on existing characters is necessary to preserve a participatory element in popular culture. Copyright's purpose, after all, is to encourage creativity for the public interest, not only to ensure monopoly profits:

> If [authors] make a killing, that's great, but it isn't the system's purpose. The system incorporates limitations because its purpose is to benefit (all of us) in a variety of creativity-enhancing ways. For example, once Mickey Mouse becomes a cultural icon, we need to be able to talk about him, sometimes irreverently.[155]

The fair use doctrine may be used to protect audiences' interests in creatively responding to what they see. Protecting the addition of creative labor as a fair use also protects copyright owners from the cumulative

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152. *See* JENKINS, *supra* note 6, at 31 (describing *Star Wars* fan fiction's underground circulation among friends despite threats of legal action); L.C. Krakowka, *Highlander: The Anthology* (visited Oct. 22, 1996) <http://www.mindspring.com/~vfoster/HL/> ("We all understand that the characters (save the ones we create ourselves) and the concept of immortality in the Highlander universe are owned by Panzer/Davis/Gaumaunt and mean no copyright infringement. We're only having fun. Chances are we won't stop writing, but we will stop 'publishing' our work if the Powers That Be cry plagiarism."); *see also Key Questions of the Debate*, *supra* note 113 ("[Is copyright] [s]calable or Boolean? TSR asserts that it is an infringement if I distribute a module via ftp. Is it then also an infringement if I distribute it to my personal friends? Where does one draw the line, or can a firm line even be drawn?").

153. *See* Harmon, *supra* note 9, at A1.

154. *See* Elkin-Koren, *supra* note 2, at 236, 280. Fan fiction demonstrates that people can easily cross the line between consumer and creator, not just become more active in their decisions about what to consume, as Elkin-Koren argues.

155. Litman, *supra* note 7, at 434 (footnote omitted) (emphasis omitted); *see supra* notes 46–48 and accompanying text.

effects on the market of widespread pure copying.[156] Emphasizing noncommerciality remains true to the communal ethos of fandom.[157] Noncommerciality is a compelling boundary because it strikes most people as just, and it also comports well with actual practice. Noncommercial users are rarely, if ever, found liable for copyright infringement.[158] The problem is that the vague state of current copyright law allows fan authors to be legally intimidated.

Fan fiction on the Internet represents human creativity in constrained circumstances. It is only different in degree from a host of activities that are legal: putting on a Barbie and Ken or *Star Wars* play in one's front yard;[159] giving an *X-Files* theme party where not all of the costumes and decorations are officially licensed; and discussing the possible sex lives of TV characters with friends over lunch. Fan fiction often requires a more creative investment than these other activities. Even though it may expose fans to ridicule, it should not expose them to legal liability.

In a broader sense, fandom demonstrates that unlimited economic incentives to create in the form of expansive intellectual property protection are unnecessary to spur productivity and may even inhibit it.

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156. *See* Litman, *supra* note 2, at 41 (advocating similar test without discussing secondary creativity). *But see* BOYLE, *supra* note 31, at 131 (criticizing focus on productive use as leading to underprotection of other forms of fair use); Lape, *supra* note 52 (same). Lape argues that productive use protects socially valueless creativity such as a pornographic movie based on a novel while prohibiting socially valuable pure copying of beneficial information. *Id.* at 715. This Article takes the position that creativity *per se* is valuable and that judges should not attempt to decide merit, particularly while the rest of copyright law contains no such aesthetic standards. Lape's objection that productive use requires courts to make illegitimate judgments about creativity is equally true of her alternative test, which requires that the allegedly infringing work have social value. *Id.* at 720–21. Lape's test might allow more pure copying, but it would threaten the expression of the most marginal users of information.

157. The noncommerciality requirement also avoids one of Keith Aoki's main objections to recognition of audience "recoding" rights: that the law finds it difficult to separate economic and social value, so intellectual property rights too easily become commodified and in turn restricted. Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding" Rights—Comment on Robert H. Rotstein, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work,"* 68 CHI.-KENT L. REV. 805, 834–35 (1993).

Aoki also objects that legality will destroy the oppositional content of appropriative art. *Id.* at 837–38. Many authors may not want to be so oppositional that they are outlaws; those who do can violate the law by refusing to limit themselves to transformative, noncommercial, and properly attributed uses. With fan fiction, moreover, the law has only limited power to legitimate fandom against its general, cultural denigration. As Rosemary Coombe notes, legal action is "possibly the most distant of the risks [fan authors] face." Coombe, *supra* note 19, at 388 n.83.

158. *See* Litman, *supra* note 2, at 40–41.

159. Even if it is not recorded, a public performance of a copyrighted work can be a copyright violation. It also does not matter how many people actually see the work, as long as the public has an opportunity to do so.

Creative activity has inherent satisfactions; economic gain is not the only motivation for creators. Purely market-oriented theories of copyright disregard the inherent power of storytelling.[160]

Copyright owners should be able to defend their creations against pure copying and against harm to market share. These two uses form a boundary that is easily policed and that fulfills the legitimate goals of copyright law. When no lucrative market share is sought and productive use is made of copyrighted characters, fan fiction should be recognized as expressing a protected and valuable form of human creativity—if only in the margins.

160. *Cf.* BETTIG, *supra* note 5, at 25 (discussing phenomenal cultural productivity throughout world history despite lack of intellectual property protection until recently).